

1 undisputed that Rule 45 says that motions for enforcement or 12
2 motions to quash any motion concerning the scope of a Rule 45
3 subpoena, that the power there is best to be heard by the court
4 that issued the subpoena, in this case, the court in
5 California, and what the defendants argues is that Section 1407
6 by virtue of its consolidation procedures gives this court
7 power that essentially trumps Rule 45, and they cite a couple
8 of cases for that proposition. We cite the Visics (ph) case,
9 which says that Rule 45 controls, and we submit to you that the
10 case that we cite is probably better authority because it
11 comports with sound statutory construction principles. The
12 provision at issue in Section 1407 is this, there is a portion
13 of that statute which says that the judge or judges to whom MDL
14 actions are assigned, may assign the powers of the district
15 judge in any district for the purpose of conducting pretrial
16 depositions in such coordinated or consolidated pretrial
17 proceedings. Now, that's very clean language. It only refers
18 to depositions. That's the only discovery matter specifically,
19 you know, assigned to the transferee court, and the most basic
20 cannon of statutory construction says that you read a statute
21 the way it's written. Congress is presumed to know the meaning
22 of the, of the terms of the statute. It, it's not a stretch to
23 say that Congress knows what the term deposition means.
24 Congress is responsible for the content of Rules of Civil
25 Procedure, so they're presumed to know what--

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1 THE COURT: And a lot of other things.

2 MR. MCGINTY: But they presume to know what Rule 45
3 says.

4 THE COURT: Including the fact that we don't get a
5 raise.

6 MR. MCGINTY: That too, unfortunately. The mission
7 to refer to matters of, in depositions can only be taken to be
8 purposeful, and, and the way that the authority say about the
9 defendants gets around that is they appeal to some general
10 policy argument concerning the nature of a 1407 proceeding
11 saying well, it says that coordinated or consolidated pretrial
12 proceedings shall be conducted by a judge or judge to whom such
13 actions are assigned. Gee, you know, that's if there's a
14 policy for them to get everything, but if that's true, why have
15 the separate reference to depositions at all. If that
16 consolidation language is good enough to give this Court
17 control over Rule 45 matters, you wouldn't need to refer to
18 depositions at all. So the question is why--

19 THE COURT: Well, does it not refer to depositions
20 that can be going on in another district where disputes arise?

21 MR. MCGINTY: That's, I think that's the purpose,
22 your Honor, is that Rule 30 of the Rules of Civil Procedure has
23 very specific provisions referenced in the Visics' case,
24 30(B)(4). It says that any time during a deposition on motion
25 of a party or of the deponent and upon a showing of, you know,

1 that the examination is being conducted in bad faith, et
2 cetera, et cetera, et cetera, the court in which the action is
3 pending or the court in the district where the deposition is
4 being taken may order the officer conducting the examination to
5 cease forthwith or may limit the scope or manner or whatever.
6 What this essentially says is that depositions being a special
7 case where stuff happens, if you need to suspend and get a
8 ruling, Section 1407 says you go to the transferee court.
9 That's the purpose of having a specific reference to
10 depositions in Section 1407. Otherwise, there's no reference
11 to any other kind of discovery, Rule 45 should control, and as
12 a third party, not a party to the case, Health Net is the third
13 party stranger to this case, resident out in California
14 producing documents in site two within California should be
15 subject to the jurisdiction of the California court. And it
16 makes sense for a number of reasons, in particular, for issues
17 that had been raised in this motion although I think have
18 been--

19 THE COURT: Well, it makes no sense in terms of the
20 fact that the judge in California knows absolutely nothing
21 about the case.

22 MR. MCGINTY: Well, I think that's the, that's the--

23 THE COURT: Particularly in a complex case.

24 MR. MCGINTY: Well, that's always going to be the
25 case, your Honor. I mean cases can be incredibly complex

15
1 without being an MDL proceeding, yet Rule 45 nonetheless gives
2 the local court the authority to determine the propriety of the
3 discovery that's being sought.

4 THE COURT: Okay, I'll hear from your brother just on
5 this issue of jurisdiction.

6 MR. MANGI: Your Honor, I admire my learned friend's
7 efforts to create an issue on the jurisdictional point, but
8 it's one that doesn't exist. The case law is discussed
9 extensively in our reply papers, and I'm happy to hand up the
10 pages if your Honor would like them. There are numerous cases
11 that address this precise issue. It's come up many times and
12 all of them uniformly hold that the MDL court has jurisdiction,
13 and, in fact, exclusive jurisdiction over these matters.
14 What's more, they go into the logic for that as your Honor just
15 pointed out, judicial economy demands that the judge most
16 familiar with the litigation hear these disputes. The district
17 for example pointed to that precise factor in the Boise case.
18 Similarly, the, Poe case in the District of DC said it would
19 make no sense if depositions were heard in one place, documents
20 in another. All these cases, and there are plenty more,
21 there's Factor A from the Northern District of Illinois,
22 Sunrise Securities from the Eastern District of Pennsylvania,
23 Dupont Plaza from Puerto Rico, even Wright & Miller have spoken
24 to this point. All of them uniformly stand---

25 THE COURT: Dupont Plaza is a First Circuit Case, so

1 yes.

2 MR. MANGI: -- that the MDL court has jurisdiction.
3 Now, the Visics case that, that my learned friend relies on,
4 that court explicitly distinguished this situation. They
5 applied their ruling only to cases where the docket, where the
6 subpoena was for documents only. They expressly distinguished
7 cases where the subpoena was for documents and a deposition,
8 which is what we have here. So Visics, even in its own terms
9 doesn't apply and what's more, Visics was expressly rejected in
10 Poe, which is the leading case and it's never been cited again.
11 So we would suggest that the weight of the authority on this
12 issue and the weight of, of shear logic is, is simple.

13 THE COURT: Do you have a copy of the reply brief--

14 MR. MANGI: Yes, your Honor.

15 THE COURT: -- if it's handy. I have it.

16 MR. MANGI: I have a, a highlighted copy that I'm
17 happy to hand up if your Honor would, would ignore the
18 highlighting.

19 THE COURT: I'm colored blind. Just one point. I
20 remember looking at it, but there was one point that I wanted
21 to--.

22 All right, well, let's move on to the substantive
23 portion of it.

24 MR. MCGINTY: I'd like to focus now on the, the
25 portion of the, of the request that seeks confidential

1 competitive business information, namely, specific
2 reimbursement terms, and I'd like to, to I think clarify some
3 things that, that perhaps might not have been addressed in, in
4 the defendants' presentation. First of all, it's fair in a
5 point to say that the defendants are entitled to, to learn
6 about methodologies. A methodology would be to say, do you
7 reimburse someone on a captitated basis? In other words, you
8 give them X dollars per member. Do you reimburse them based on
9 some Mac type schedule where you have a separate, you have
10 price list for the drugs? Do you reimburse them on a formula
11 that says AWP minus a stated percentage plus a dispensing fee?
12 That's methodology, that's what they're, that's what they're,
13 they're certainly entitled to get is methodology. What Health
14 Net is talking about is the actual price. It matters
15 competitively for Health Net that there is a difference, a
16 competitive difference between them and other, other plans with
17 whom they compete, whether it's just to, to use number
18 randomly, whether it's AWP minus 12.5% versus AWP minus 13% or
19 15% or whatever. What we're saying is they can find, we can,
20 they're entitled to find and we've given them the information
21 which shows to them that it is in these exemplar contracts AWP,
22 AWP minus a percent. We just don't tell them what the
23 percentage is, and that's what we think is entitled to be
24 protected here. It's not clear to us why that precise
25 percentage is needed to be disclosed. What is clear is that it

1 is going to be a competitive disadvantage for Health Net,
2 that, you know, Health Net believes that it does a good deal
3 striking, good job striking competitive deals and what is a
4 great competitive realm. In fact, the defendants in their own
5 tutorial to this Court on these issues says these are complex
6 negotiations between multiple entities. There's
7 competitiveness at each level of the chain and Health Net is
8 able to price its services to its clients because it negotiates
9 these deals and it potentially loses that advantage if other
10 people know what they're able to extract from the providers
11 with whom they contract.

12 THE COURT: Well, there is a protective order here.

13 MR. MCGINTY: Well, it's, the protective order is
14 certainly there, but I think it's at best an imperfect
15 protection, certainly one that has to get a third party
16 stranger to this dispute. Plus, I know that at one of the
17 tutorials, notwithstanding the existence of this protective
18 order, it's my understanding that the reimbursement rate that
19 Express Scripts uses to pay to CVS was actually disclosed in
20 open court, and there's no, there's no dispute that there's a
21 likelihood that this sort of information can come out at trial,
22 notwithstanding the protective order. So, while the--

23 THE COURT: Well, that's an issue for trial down the
24 road, that's--

25 MR. MCGINTY: But that's, I guess the question is

1 that assuming that it is, it is, it is possible for the
2 purposes of allowing the defense to mount an adequate defense
3 to give them methodology without giving them precise pricing,
4 why expose Health Net to the competitive risk, and, all we're
5 saying is there needs to be an appropriate balancing here.

6 Parenthetically, your Honor, you know, the only reason we're
7 here is to strike this balance. There's the--

8 THE COURT: Well, are you proposing an alternative of
9 what you're willing to produce?

10 MR. MCGINTY: Well, first of all, as a, the point I
11 think I was about to make was that with respect to the
12 documents that that they asked for after the deposition that
13 have not been produced, the only reason they have not been
14 produced is that until these issues are resolved, there's no
15 purpose in producing them, so that certainly if, if they are
16 resolved, we'll hand them over at that point. But I think your
17 Honor, that our argument is, is that what we've given which
18 shows them the methodology but not the precise pricing is
19 giving them what they need and this is an appropriate
20 disclosure. They have the methodology. They say that's what
21 they're entitled to. We're not sure why there should be
22 anything more produced on that point, and I think that the
23 Vitamins case is, is not distinguishable on the grounds that
24 counsel presents. Yes, the posture of the case was that it was
25 early in the case while motion to dismiss was pending, but what

20
1 was going on there is what should go on whenever there is this
2 type of discovery dispute. It's a balance, and in that posture
3 of the case, the court is saying the need for it at this stage
4 is low. The risk is considerable to the producing third party,
5 we're going to exercise our discretion to strike that balance
6 now against the production of the documents, reserving frankly
7 the question about what, how the balance would be struck later
8 on in the case, but certainly the principle holds. And, I
9 think where we come out on this is that defendants haven't
10 offered a compelling argument why the balance should be struck
11 here to require us to to disclose information which is going to
12 put us--

13 THE COURT: It, it may not be compelling to you--

14 MR. MCGINTY: -- at this stage.

15 THE COURT: -- but I'm inclined to think it's
16 compelling to me at this point. But, anything else?

17 MR. MCGINTY: I mean, the other, I think one other
18 point just to address the issue about why it should be
19 important to get the precise pricing is the notion that things
20 are going to, you know, things change over time and, of course,
21 contracts are set for a fixed term. And during a contract
22 term, it's always going to be AWP minus whatever percentage it
23 is that these contracts are not indexed. Certainly if they
24 want to see earlier versions of contracts, we can show them
25 that the methodology was used and maybe even tell them that,

1 about the magnitude of any changes in the discount that was
2 used over time, but the precise pricing isn't going to be
3 necessary to address that point.

4 THE COURT: Two minutes--

5 MR. MANGI: Your Honor--

6 THE COURT: -- on why you need the precise pricing.

7 MR. MANGI: Absolutely. Your Honor, the fact that
8 AWP maybe used in some of Health Net's contracts doesn't give
9 defendants any information that's not available in the public
10 domain. Some insurers use AWP for some of their contracts, as
11 does Health Net. Health Net also uses other methodologies,
12 such as capitation in some cases. But, the key parts, and I'll
13 try not to repeat myself, is that one can only carry out useful
14 analysis using the actual numbers, and I'll take just one
15 example leaving aside the four I discussed, and go back to the
16 bundling point. These contracts are competitive bargains in
17 the marketplace. I completely agree with my brother on that,
18 but the only way you can assess that is by looking at the
19 terms. If for example there's a lower amount being paid in
20 reimbursement, there'll be a higher amount being in the
21 dispensing fee. There'll be other terms of the contract that
22 may come in and be relevant, the financial terms that'll modify
23 those accounts, the expectation theory. There's no way to
24 counter that unless you know the exact terms. If I know that
25 they use AWP in some contracts, that doesn't tell me anything

1 about whether Dr. Hartman's expectation is valid or not.
2 There's simply no way if you look at even at the tutorial,
3 which is public. Defendants use some scatter clause showing
4 claims data and precise reimbursement points. You can't make
5 those points with only methodologies.

6 The only other point, your Honor, that I'll make
7 briefly is in terms of the other documents. As your Honor
8 knows, this subpoena was issued in, in November of, of 2000.
9 These additional documents that were sought after subpoena,
10 most of them were nothing new. They were stuff we'd asked for
11 originally. The witness just testified about them. So I would
12 request that if your Honor is inclined to grant these motions,
13 your Honor also provide a specific timeframe as we requested in
14 our proposed order so we can get all of these documents
15 together in time for summary judgment.

16 Thank you, your Honor.

17 THE COURT: All right, I'll move on.

18 MR. MCGINTY: I'm, I'm sorry.

19 THE COURT: Just seconds. Do you want a quick
20 response or--

21 MR. MCGINTY: Actually, one, one point which I think
22 is not a matter of great dispute but I did at least want to, to
23 raise here is that we had, we had raised in our papers the
24 notion that, that some of what they're seeking with respect to
25 claims data is very expensive to try to recover because it's

1 archived, and it's my understanding the defendants have
2 conceded that they would be obligated to pay for that. We
3 think that any order requiring the production of that data
4 should provide the defendants will bear the reasonable cost of
5 recovering the archived data.

6 MR. MANGI: Your Honor, we stated we'd pay for it
7 before we even asked for it.

8 THE COURT: All right. All right, moving on to your
9 motion. I'll--

10 MS. CICALA: Thank you, your Honor.

11 THE COURT: I'll hear the argument on both motions,
12 take a brief recess, and then give you a ruling from the bench.

13 MS. CICALA: Thank you, your Honor. Just a point of
14 clarification. Suffolk County had filed a second motion to
15 compel against Schering-Plough. We served that on defendants
16 on January 20th. They responded on the 25th. It was not
17 regrettably filed with the court until yesterday. I don't know
18 if your Honor is expecting to hear argument on that today. I am
19 prepared to proceed if you would like. I can't speak for
20 defense counsel on that, but I'll leave it to your Honor.

21 THE COURT: Well no, because I don't have it. This
22 docket was just, the docket that I had yesterday, didn't have
23 it on it. This docket was just printed out this morning and--

24 MS. CICALA: It concerns a narrow issue of, regarding
25 production of sharing documents related to their Texas

1 litigation.

24

2 THE COURT: For the record, for the record it's
3 docket entry number 1300.

4 MS. CICALA: Thank you.

5 THE COURT: Well, we'll see. I mean, if your brother
6 is prepared to address it as well.

7 MR. MCGINTY: Your Honor, we are prepared to address
8 it if you'd like to hear the motion.

9 THE COURT: Well, then we might as well.

10 MS. CICALA: Thank you, your Honor. Should we do
11 them one at a time, however?

12 THE COURT: Please.

13 MS. CICALA: Okay. The first motion filed by Suffolk
14 concerns the form of the discovery being produced to it by
15 Schering-Plough. And specifically, Suffolk seeks Schering's
16 compliance with that part of CMO 10 that directs any of the
17 parties to produce any documents available in electronic
18 format, shall be so provided in that format. Suffolk began
19 it's review of Schering documents in Boston a couple of months
20 ago, and in the course of that review, confirmed that those
21 same documents it was reviewing in hard copy were available
22 electronically. However, Schering refused to produce them to
23 us electronically on the basis that the liaison counsel and the
24 MDL had negotiated with Schering that the documents would be
25 produced in hard copy. We were not privy to those discussions

1 and did not elect to receive documents in hard copy. For most 25
2 of these, our preference is to receive them electronically, and
3 we would like to be able to do that.

4 THE COURT: Well, if they're available in hard, in
5 electronic form, why can't they have it that way?

6 MR. CHRISTOFFERSON: Thank you, your Honor. I think
7 the answer to this question lies in Case Management Order No.
8 9, which preceded Case Management Order No. 10. It, it is true
9 as counsel for Suffolk has suggested, that Schering had
10 hundreds of thousands of documents, responsive paper documents
11 scanned into electronic format at a cost of nearly \$300,000 to
12 Schering. Case Management Order No. 9 requires liaison counsel
13 to coordinate discovery for plaintiffs from cases that were
14 brought by government entities, including Suffolk. Schering
15 offered to provide those responsive documents to lead
16 plaintiffs in electronic format if they would agree to share in
17 the cost. The lead plaintiffs declined that offer and
18 requested that we produce those documents in paper form, which
19 we did. Case Management Order No. 9 also requires defendants,
20 Schering, to make available to Suffolk those documents that
21 were made available to the lead plaintiffs to the extent that
22 those documents relate to drugs identified in Suffolk's
23 complaint. Schering made available those documents to Suffolk.
24 Suffolk has reviewed those documents and those were documents
25 that were related to Suffolk's complaint, the drug identified

1 in Suffolk's complaint. Suffolk has reviewed the documents
2 and, contrary to their assertions, under the Case Management
3 Orders, Schering is not required to make additional and
4 separately negotiated productions to Suffolk. Notwithstanding
5 the reliance on Case Management Order No. 10, Case Management
6 Order No. 10 did not supplant or revise the language regarding
7 discovery coordination in Case Management Order No. 9. The
8 whole point of this Case Management Order is to avoid
9 unnecessary and duplicative discovery requests and negotiations
10 and the associated costs. Suffolk now apparently wants to
11 substitute themselves into the position of lead plaintiffs, but
12 that's not a decision that either Schering or Suffolk can make.
13 Schering has made the documents available to Suffolk. Suffolk
14 has reviewed those documents, and nothing more is required of
15 Schering.

16 THE COURT: I'm inclined to agree.

17 MS. CICALA: Your Honor, I, I don't, I, I'm unsure
18 what my brother refers to when he refers to us being lead
19 plaintiffs. I mean, Suffolk has an independent case. It's not
20 part of the class case. It was not consulted so, first of all,
21 I don't understand why Suffolk should be bound--

22 THE COURT: But I think everybody has to play by the
23 same rules here. I mean, the idea is to keep the cost down.

24 MS. CICALA: Absolutely agreed, your Honor. Had
25 Suffolk the opportunity, had liaison counsel in any way

1 consulted with Suffolk before making a unilateral decision
2 with regard to how it sought to collect the sharing materials,
3 then I would not be standing before you. But regrettably, and
4 we have a motion that continues to be subjudice on this issues,
5 regrettably, Suffolk was not privy, was not included in any of
6 those discussions. Then perhaps the issue should be--

7 THE COURT: Well I think your issue--

8 MS. CICALA: -- addressed between--

9 THE COURT: -- is with liaison counsel.

10 MS. CICALA: So it would seem, your Honor. If I may
11 say one more thing though. However, on the issue of cost and
12 efficiency, I cannot understand how there is any excessive cost
13 or inefficiency in Schering delivering to us electronically
14 that which is available electronically. The, there's no, we're
15 talking about a punch, you know, a click of a button, a copying
16 of a CD, as opposed to copying papers and transmitting boxes
17 which is certainly under any scenario, far less efficient.

18 THE COURT: Well, it sets a precedent. That's the
19 only problem.

20 MS. CICALA: I'm afraid that the precedent that may
21 be set here, however, your Honor, is that Suffolk County and my
22 other clients, frankly, I also represent the City of New York
23 and the counties of Rockland, Westchester, Onijaga (ph), and
24 numerous other counties who are about to join in this
25 litigation who have separately retained us, that each of these

1 important governmental entities, the City of New York, for
2 example is one of the largest Medicaid payers in this country,
3 shall be prejudiced by the fact that liaison counsel in this
4 matter has not conducted itself as liaison counsel. I'm sorry
5 to have to say this, should be conducting itself, i.e.,
6 coordinating with those parties for whom has been charged to
7 coordinate. Now, if the issue is that I need to address that
8 more strenuously with liaison counsel and this Court, then that
9 will be our route.

10 THE COURT: All right, briefly.

11 MR. CHRISTOFFERSON: Your Honor, just briefly, if I,
12 if I may. I think the bad precedent that may be set here is
13 precedent that is, that is negative towards the defendants
14 because Schering spent over, nearly \$300,000 preparing these
15 trial preparation materials. There's a large amount of sum
16 cost that have gone into that process and if now simply just by
17 asking and not following the Case Management Orders the other
18 counties and other plaintiffs are allowed access to those
19 documents, it is a windfall for them and a loss to Schering.

20 THE COURT: All right,

21 COUNSEL: Your Honor-

22 THE COURT: -- now I'll hear you on the other.

23 COUNSEL: -- if I could just briefly as counsel for
24 liaison counsel just speak to what's been said. I, I do take
25 offense to the fact the statement that liaison counsel has not

29
1 conducted themselves in a manner which is appropriate for
2 liaison counsel to conduct themselves. At the time, I haven't
3 been privy to all of the negotiations with respect to Schering-
4 Plough, but when we negotiated with Schering-Plough, we did so
5 in what we thought was the most efficient manner. There are
6 plaintiffs who came in, you know, either during or after those
7 negotiations took place. We were not purporting to negotiate
8 on behalf of absent plaintiffs who come in afterwards. It's
9 not clear to me that Suffolk even had document requests pending
10 at the time that that negotiation was had. And let me just
11 tell you about where we ended up with respect to Schering's
12 documents and the reason we did what we did. Schering
13 indicated the volume of documentation that they had available
14 in paper. We knew from our investigation of the case and from
15 experience that a lot of that paper was going to be useless to
16 us, and turning that into electronic format would be even more
17 useless. It would be a waste of time and money for all
18 involved. So our approach to this entire thing is when they
19 tell us we have 600 boxes available in a warehouse down in New
20 Jersey, we send a team of lawyers to go down there and cull
21 through that 600 boxes and pick out however many boxes, a
22 subset of those boxes that are relevant to the case, and we had
23 those documents copied in paper format and sent to our offices
24 and had them distributed widely amongst the co-lead counsel who
25 are working on our case, and analyzed and are not in one

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1 specific format or place that are able, you know, they're
2 sharing 600, what, what have you. That's how we've tried to
3 cut things back. We didn't think it made sense to wholesale
4 copy things. Believe me, I was in one of those warehouses for
5 two to three days, and there was a lot of stuff that no one
6 wants, and it didn't make sense to do it any other way.

7 THE COURT: All right. Do you want to be heard on
8 1300?

9 MS. CICALA: Yes, thank you, your Honor. Suffolk's
10 second motion concerns a document request it served on
11 Schering-Plough seeking production of all documents and
12 materials, including deposition transcripts and so forth, that
13 Schering produced to the State of Texas in its litigation with
14 the State of Texas. Schering's objection to our request is
15 that the production, well, initially Schering said that there
16 were not documents in there that concerned Schering, and now
17 they have acknowledged that there are documents within the
18 Texas production that involved Schering or were Schering
19 produced documents, but Schering says it would be burdensome
20 for them to go through the Texas production to identify the
21 Schering documents. I think I can solve that problem. I have
22 a relationship with the Texas attorney general who's
23 cooperating with the City of New York and the County of Suffolk
24 and all of my other clients. They will provide us access to
25 the documents. We will do Schering's work for it. It needn't

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1 be bothered in the slightest with this production. Schering
2 has produced to Suffolk here. They've acknowledged that they
3 should be. The production has not been confined to Claritin.
4 We have received from Schering the documents that it produced
5 to the House Energy Committee. So they have produced a broader
6 production here, so there can be no reasonable objection to us
7 receiving that which they produced to Texas, particularly where
8 we're willing to do the work, and of course include them in
9 whatever we receive from Texas so that there's nothing
10 inappropriate and that we don't go into warrant witnesses, so,
11 so for example.

12 THE COURT: Do you need a special agreement in place
13 to do this, or?

14 MS. CICALA: With Texas?

15 THE COURT: Yes.

16 MS. CICALA: To the extent we need to be signed on to
17 the Texas protective order, the Texas AG has agreed that we,
18 that they will facilitate that process for us. We've asked
19 Schering to not object to our signing on to the Texas
20 protective order. I would certainly include Schering in all my
21 communications with the Texas AG with regard to these documents
22 and copy them on any documents I receive from the Texas AG.
23 This needn't burden Schering in the slightest.

24 THE COURT: Problem with it?

25 MR. CHRISTOFFERSON: Yes, your Honor. Thank you. I,

1 I'm not sure---

2 THE COURT: Too good to be true.

3 MR. CHRISTOFFERSON: Your Honor, I'm not sure if
4 you'd like a copy, I brought extra copies of opposition if
5 you'd like me to hand them up to you, or you'd rather it--

6 THE COURT: No, just argue it to me.

7 MR. CHRISTOFFERSON: Okay. Respectfully, your Honor,
8 I think that counsel for Suffolk is missing the point here. It
9 is true that pursuant to discovery requests in this litigation,
10 Schering has made available to the lead plaintiffs in this case
11 relevant documents from this Texas litigation. That entire
12 case though concerns generic products, including products
13 manufactured and marketed by Warrick. There were no claims in
14 that case that Schering did anything wrong with respect to any
15 of its drugs. The discovery produced by Schering and Warrick
16 in that case overwhelmingly related to Warrick and Warrick
17 products, and there was lots of discovery in that case, nearly
18 400,000 pages worth. Although Ropes & Gray did not represent
19 Schering and Warrick in that action, local counsel, who has
20 submitted a declaration in support of our opposition, informs
21 us that there might have been some minimal amount of documents
22 produced in that production that did not relate exclusively to
23 Warrick or Warrick related products, and that may have had some
24 bearing on Schering. Judge Saris, however, has issued a stay
25 on discovery by Suffolk into claims, its claims against

1 Warrick. So, all the documents produced in the Texas
2 litigation, except for some minimal amount, relate to claims
3 into which discovery is stayed. The only remaining question
4 would be whether these minimal needles in a giant haystack of
5 documents are even relevant to Schering, to Suffolk's claims
6 against Schering. We don't know the answer to that and could
7 not know the answer to that without ourselves reviewing the
8 entire production. The suggestion that Suffolk go and do our
9 "work" for us, does not solve the problem, because then they
10 would have access to lots of documents, almost 400,000 pages
11 worth, that relate only to their claims into which discovery
12 has been stayed. It's simply unreasonable and unduly
13 burdensome for them to require Schering to sift through
14 hundreds of thousands of pages of documents to find a few that
15 may or may not be relevant to Suffolk's claims. In other
16 words, the burden that Schering would have to bear is grossly
17 disproportionate to the value that Suffolk would gain from some
18 few potentially relevant documents. The discovery here
19 violates Judge Saris' order because the claims to which it is
20 directed, the claims against Warrick have been stayed and are
21 not subject to discovery at this time, regardless of to whom
22 the request might now only be made.

23 THE COURT: Why should I grant this with the stay in
24 place?

25 MS. CICALA: The stay is against, is at to Warrick. I

34
1 absolutely agree. We don't seek any Warrick documents. We
2 don't seek any deposition testimony from any Warrick witnesses.
3 We seek documents produced in Texas by Schering, which exist.
4 We seek Schering deposition transcripts, which exist. The
5 Texas AG has those documents identified as Schering documents
6 and those transcripts identified as Schering witnesses. I'm
7 not looking for anything that's stamped with a Warrick bates
8 number at this time. I'm talking about Schering documents and
9 Schering witnesses. So, in that regard, this in no way
10 violates Judge Saris' order. The issue devolves to burden and
11 we can relieve them of the burden by receiving only that which
12 is stamped Schering-Plough and only for witnesses that were
13 produced by Schering-Plough.
14 MR. CHRISTOFFERSON: Your Honor, if I may respond
15 just briefly? I think again counsel is missing the point. It,
16 it doesn't matter to whom, you know, whether Schering as
17 Schering produced the documents. The documents that Schering
18 produced overwhelming related to Warrick and Warrick's
19 products. You would have to, she would have to then figure out
20 which of those documents were actually relevant to their
21 claims, and according to the, the information that you received
22 from local counsel, those documents are minimal, minimal and it
23 would only be a handful. So whether Schering is required to go
24 through and wade through and find a handful of documents or
25 someone else, I guess the, the attorney general would find

1 documents and then, you know, send them back to Suffolk.
2 Either way, it's going to require an amazing amount of effort
3 that is frankly disproportionate to the value.

4 MR. DeMARCO: Your Honor--

5 THE COURT: Mr. DeMarco?

6 MR. DeMARCO: -- just briefly. There's another
7 feature to this that my colleague, Mr. Muehlberger would like
8 to discuss with respect to other defendant in this aspect of
9 discovery.

10 MR. MUEHLBERGER: Your Honor, very briefly, this is
11 the first I've heard about the, possibly the County of Suffolk
12 signing on to the Texas Attorney General protective order. But
13 there are witnesses in that case, for instance plaintiffs'
14 expert in the MDL, Dr. Schondlemeyer, as I understand it was
15 also an expert witness who rendered a report and I understand
16 also testified in deposition in the Texas AG case, which we
17 have not been privy to and not been allowed to see because of
18 the Texas AG order in place, and so what I simply raise, to the
19 extent the Court is inclined to consider to allow the County of
20 Suffolk to sign on the Texas Attorney General protective order,
21 defendants be allowed to consider that issue and perhaps file
22 something on the record to protect their interest and make sure
23 everybody is on the same playing field.

24 THE COURT: All right. I'll take a brief recess, come
25 back at quarter of twelve.

1 (Recess, reconvene 11:51:16 a.m.)

2 (Court called into session)

3 THE COURT: All right, please be seated. All right.
4 On docket entry No. 1175, the motion is allowed subject to the
5 enforcement of the confidentiality order. I'd like to set a
6 deadline, so tell me what you think is a reasonable time for
7 production.

8 MR. MCGINTY: Your Honor, I would suggest that that
9 deadline should be 90 to 120 days. These documents by and large
10 are located in Sacramento. They will have to be reviewed.
11 They will have to be vetted for privilege, and it's going to
12 take some time to do that. In addition, many of these
13 documents are in electronic format and, as it stands right now,
14 I'm unaware of what, if any, systems are in place in order to
15 access some of those documents. So we should have a
16 significant amount of time.

17 THE COURT: Well, I could give you 90 days, but what
18 about phasing it as things become available?

19 MR. MCGINTY: Your Honor, we have no objection to
20 that, and as a matter of fact, in the productions that have
21 been taking place at this point, we have been producing on a
22 rolling basis that by agreement with Mr. Mangi's office. So, I
23 would not object to that.

24 THE COURT: Okay.

25 MR. MANGI: May I be heard, your Honor?

1 THE COURT: All right.

2 MR. MANGI: Your Honor, very briefly, there, there's
3 separate components to this motion. First producing an
4 un-redacted copy of what they've already produced, that takes
5 no time. Just take off the tape, and copy it again. So we
6 submit that should be produced within 14 days. The second
7 component is a production of claims data.

8 THE COURT: Can you do that within 14 days?

9 MR. MCGINTY: I do not know, your Honor, whether that
10 can be done that quickly. I would suggest that the order the
11 Court was intending to enter is probably the right one.

12 THE COURT: Well--

13 MR. MCGINTY: But we will--

14 THE COURT: -- what I'd like to do is say 90 days,
15 but let's set a tentative schedule for the phases. So if you
16 could do this within four, the first 14--

17 MR. MCGINTY: Yes, your Honor. As I, as I have, have
18 indicated, we are willing to produce on a rolling basis, as
19 we're able to do it. I think that the outside limit of 90
20 days, should, should stay in place, but I will represent to the
21 Court and to Mr. Mangi that we will produce on a rolling basis
22 as we are able to do that.

23 THE COURT: But let's see if we can set a schedule
24 for that rolling basis.

25 MR. MANGI: Your Honor, if, if I may just speak to

1 the two other components of this? The second component is
2 claims data. Health Net has represented to us in numerous
3 letters that are appended to our motion they can produce claims
4 data within six to eight weeks of start. Given that summary
5 judgment is, is fast up and coming in this case, we would
6 request that they be held to that schedule. And the third
7 component of it, are these additional documents. Again your
8 Honor, these are very specific documents. They won't be more
9 than that high. There are no privilege issues. Most of them
10 are just contracts. Ninety days, we would submit, is entirely
11 unrealistic and we would submit that certainly the un-redacted
12 production in 14 days, original--

13 THE COURT: All right, un-redacted production, 14
14 days.

15 MR. MANGI: The claims data within, they ask for six
16 to eight weeks, we'll say eight weeks is fine.

17 THE COURT: All right.

18 MR. MANGI: And the additional documents--

19 THE COURT: So, six to eight weeks, so will give you
20 the 60 days on that.

21 MR. MANGI: And these additional documents, your
22 Honor, which is again as I mentioned, just a handful, we would
23 suggest those could be produced within a month. I mean, the
24 subpoena has been out there since November or 03.

25 THE COURT: All right, within 30 days.

1 MR. MCGINTY: Your Honor, if I may. The
2 representation that was previously made to Mr. Mangi's office
3 was that it would, it would take eight weeks after we had
4 systems in place in order to locate and access the documents.
5 Eight weeks is two, is two months. It's 60 days essentially. I
6 would request that the Court stand upon the original intent of
7 90 days because it's going to take us eight weeks after we get
8 the systems in place and, and there's an, an unknown amount of
9 time to get that done. I think 90 days is a much more
10 reasonable estimate for, for producing--

11 THE COURT: For final completion.

12 MR. MCGINTY: Yes, your Honor.

13 THE COURT: But phased in as we've said here today.

14 MR. MANGI: Your Honor, on claims data, we got claims
15 data from other defendants within four days, within five days.
16 This, this eight weeks is outlandish to begin with, but that's
17 the maximum we can work with to be able to use this data for
18 summary judgment.

19 THE COURT: Yes, I mean I had, haven't thought of the
20 summary judgment issue since I'm not dealing with that so, I'm
21 inclined to say 60 not 80, not 90.

22 MR. MCGINTY: Your Honor, may I inquire because I am
23 unaware. When is the summary judgment motion scheduled to be
24 heard?

25 THE COURT: Well, to be heard, I don't know.

1 MR. MCGINTY: When is it scheduled to be briefed?

2 MR. MANGI: Your Honor, I believe summary judgment is
3 in, is in May. Is that correct?

4 UNIDENTIFIED: Yes.

5 THE COURT: Well--

6 MR. MANGI: Your Honor, plus on, on the other claims
7 data--

8 THE COURT: You know, at the end of the 60 days, if
9 it's not done, we'll deal with it. But let's, let's shoot for
10 60, rather than 90.

11 MR. MANGI: Your Honor, the, the only remaining issue
12 on, there was one minor lingering issue which is that of Health
13 Net has put these water marks on their documents. They're
14 expressly forbidden in CMO 10. They obscure text. Judge Saris
15 explicitly forbade them. We told them that. They still did
16 it. We ask for clarification on that matter also. It's in our
17 proposed order.

18 MR. MCGINTY: Your Honor, there are water marks on
19 the documents. I've seen every one of them. Not one of them
20 obscures text. They are a gray background, rather than an
21 overlay. I'm personally unaware of what Judge Saris has
22 ordered.

23 THE COURT: Are these watermarks already on the
24 documents?

25 MR. MCGINTY: They are already on the documents that

1 have already been produced.

2 MR. MANGI: Your Honor, they're, they're highly
3 confidential 1456, all over the page. They can just be put on
4 the bottom right like every other document in the case.

5 MR. MCGINTY: They, they are, they are again, your
6 Honor, I've seen, I have personally seen each and every page of
7 these. They, they are not all over the page. They are in the
8 center. They are a gray background. They do not obscure any
9 text.

10 THE COURT: Well, if they obscure something, then you
11 have to produce it a second time in a non-obscure form.

12 MR. MANGI: Your Honor, counsel's point is that they
13 are in grayscale. The color of grayscale varies by the
14 photocopy. Judge Saris said put them where, outside the text.

15 THE COURT: You know, I don't want to deal with this.
16 Work it out.

17 MR. MANGI: Your Honor--

18 THE COURT: Work it out. Get together. Work it out
19 so everybody can read everything.

20 MR. MANGI: Thank you, your Honor.

21 MR. MCGINTY: Your Honor, for my edification, I
22 perhaps didn't make my notes as as completely clear as they
23 should be. May I ask if the Court would summarize what the
24 order, what the order is?

25 THE COURT: Get a copy of the transcript.

1 MR. MCGINTY: Is there one, is there a trans--

2 THE COURT: Well, they'll have to be prepared.

3 MR. MANGI: I have good notes. I'll be happy to
4 discuss--

5 THE COURT: Okay, outline how you believe--

6 MR. MANGI: Absolutely.

7 THE COURT: -- I've stated.

8 MR. MANGI: Your Honor, the production, the documents
9 that have already been produced, your Honor has said that they
10 should be produced in their un-redacted form, presumably
11 including missing pages, within 14 days.

12 THE COURT: Slow, slow down so that he can take it
13 down.

14 MR. MCGINTY: A little slower, Adil, please.

15 MR. MANGI: Oh, I apologize.

16 THE COURT: Wait, let him get this--

17 MR. MCGINTY: I, I got that.

18 THE COURT: You got that.

19 MR. MCGINTY: But a little slower next time.

20 MR. MANGI: I personally wrote a big 14. The, the
21 additional documents that are identified in our October 15,
22 2004 letter, which follow depositions, your Honor has ordered
23 the production of those documents within 30 days. And the
24 production of claims data, your Honor has ordered within 60
25 days.

1 THE COURT: Clear enough?

2 MR. MCGINTY: Yes, your Honor, simply that that 60
3 days subject to reevaluation depending on what the technical
4 issues are.

5 THE COURT: I'll listen to you. You know, you get to
6 that point, you file a motion, I'll hear you.

7 MR. MCGINTY: Okay.

8 THE COURT: But, you know, always try and talk with
9 each other and see if you can try and work things out, and, you
10 know, as to the watermarks, see if you can work this issue out.
11 I mean this is--

12 MR. MCGINTY: We, we do speak to each other, your
13 Honor, regularly. I'm sure that as reasonable people, we can
14 resolve that.

15 THE COURT: All right, as to docket entry No. 1189,
16 the motion is denied. I'm afraid you are bound by what liaison
17 counsel has done in the past, and I think you have to talk to
18 liaison counsel and make that clear.

19 As to 1300, it's denied without prejudice at this
20 time, having heard from Mr. DeMarco's co-counsel. I'll give
21 everybody else 14 days to weigh in on this if they want to file
22 anything.

23 MS. CICALA: Thank you, your Honor.

24 THE COURT: All right, and then when you, when we get
25 everything, we can set up another hearing date

1 MS. CICALA: Thank you.

2 MR. CHRISTOFFERSON: Your Honor, just a quick point
3 of clarification, are you inviting further submissions by, by
4 Schering & Suffolk or just, you know, other defendants?

5 THE COURT: Well, you've, did, I mean, did you really
6 get much of chance to respond?

7 MR. CHRISTOFFERSON: We, we did file--

8 THE COURT: You're satisfied. I mean--

9 MR. CHRISTOFFERSON: Okay. Thank you, your Honor.

10 THE COURT: If anybody else wants to respond, only
11 because it was just yesterday. Okay.

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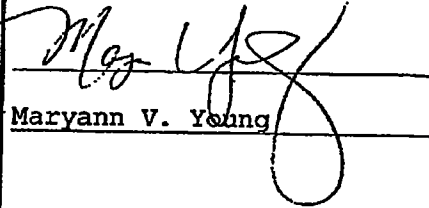
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CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.



Maryann V. Young

March 6, 2005

Maryann V. Young
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